

MINUTES

MONTANA SENATE 58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN DUANE GRIMES**, on February 4, 2003 at 9:00 A.M., in Room 405 Capitol.

ROLL CALL

Members Present:

Sen. Duane Grimes, Chairman (R)
Sen. Dan McGee, Vice Chairman (R)
Sen. Brent R. Cromley (D)
Sen. Aubyn Curtiss (R)
Sen. Jeff Mangan (D)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)
Sen. Gary L. Perry (R)
Sen. Mike Wheat (D)

Members Excused: None.

Members Absent: None.

Staff Present: Judy Keintz, Committee Secretary
Valencia Lane, Legislative Branch

Please Note. These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing & Date Posted: HB 77, SB 281, SB 285, 1/30/2003
Executive Action: SB 283, SB 263

HEARING ON HB 77

Sponsor: REP. LARRY JENT, HD 29, BOZEMAN

Proponents: Mike McGrath, Attorney General for the State of Montana

Opponents: None

Opening Statement by Sponsor:

REP. LARRY JENT, HD 29, BOZEMAN, introduced HB 77, which provides a procedure for the courts, counsel, and prisons in regard to a claim that DNA testing would exonerate a person who has been convicted and is in prison. There are not very many of these cases. He remarked that Jimmy Baumgard spend 14 years in the Montana State Prison for a rape and murder that he did not commit. He was recently exonerated by DNA testing.

REP. JENT noted the House Judiciary Committee amended the bill and he is in support of the amendments. The bill sets criteria for testing. There needs to be a claim of innocence and a valid DNA sample. If the conditions of the original case were such that samples were not collected or preserved, testing would not be possible. The evidence must not have been tampered with, contaminated or altered. The results of the DNA testing must make a difference. Most of the cases in which DNA testing is being done include rapes or murders. Ordinarily, the cases have involve eyewitness testimony that was not reliable.

Section 1 sets out the information which needs to be in the petition. The petitioner must show the type of DNA testing being sought. The judge may order a hearing on the petition. The hearing needs to be before the judge who conducted the trial, unless that judge is unavailable. The court shall grant the hearing if it is shown the evidence to be tested is competent evidence. The identity of the perpetrator needs to be a significant issue. If previous testing has been done, it is necessary to show the new test results would be more discriminating and probative. If the parties cannot agree on a lab for the testing, the court will choose the lab. The House Judiciary Committee passed an amendment which substituted the state crime lab for a lab of the court's choice. If the state had performed an earlier test, an independent lab should test the evidence. If the tests are not favorable to the prisoner, the court may order further testing or terminate the proceeding. The court would also need to notify the Board of Pardons and Parole and place this information into the DNA index, notify the victim, and terminate the proceeding. If the tests are favorable to the

prisoner, the court would order a hearing and make the appropriate orders.

There is a three-year limit on preservation of evidence. The change made by the House Judiciary Committee added the words, "conviction in the case becomes final". This would be after the conviction came back from the Supreme Court.

Proponents' Testimony:

Mike McGrath, Attorney General for the State of Montana, rose in support of HB 77. He noted the case in Yellowstone County wherein Jimmy Braumgard was convicted of sexual intercourse without consent in 1989 and served 14 years in the Montana State Prison. He eventually put together enough evidence which persuaded his department to allow samples to be sent to an independent lab in California for DNA testing. It was determined that samples left at the scene were not Mr. Braumgard's. The evidence was retested in the state crime lab and the results mirrored the results found by the independent lab. A motion was then filed for his release because it was clear from the DNA evidence that he did not commit the crime for which he had been convicted. This was a tragic circumstance for the prisoner, his family, and the victim. It is also tragic for the law enforcement community. The last thing a prosecutor wants to do is convict the wrong person. New technology allows a review of old cases, if necessary.

This bill addresses post-conviction DNA testing. It requires a claim of innocence, a sufficient sample for testing, and the testing must make a difference in the particular case for which the conviction was made. When the bill was originally submitted, the expectation was there would be no fiscal impact. An amendment was placed in the bill by the House Judiciary Committee adding the option for the court to use an independent lab. This could involve some fiscal impact.

Opponents' Testimony: None

Questions from Committee Members and Responses:

SEN. BRENT CROMLEY asked whether using a different judge had been considered. **REP. JENT** noted the main reason for having the trial judge is because he or she would know all the facts and circumstances of the case.

CHAIRMAN DUANE GRIMES questioned whether using the first judge may present an unnecessary burden. **REP. JENT** remarked he would be willing to look at other alternatives. Any district judge

could address the issue. The first thing to be considered is the proper venue for post-conviction review. He believed it should be in the county where the person was convicted.

SEN. GARY PERRY asked whether there was a law in regard to how long the evidence needed to be kept. **REP. JENT** explained the bill stated the state shall preserve scientific identification evidence the state has reason to believe contains DNA for three years after the case becomes final. A court order may be obtained to have the evidence preserved for a longer time.

Attorney General McGrath stated the state crime lab kept all biological specimens indefinitely. They have a fully accredited DNA laboratory and are also a member of a national DNA indexing system.

SEN. JEFF MANGAN questioned whether the results would be placed into the indexing system if the person was exonerated. **Attorney General McGrath** claimed all sex and violent offenders are tested and the results are sent to the lab and would already be placed into the data bank.

{Tape: 1; Side: B}

SEN. AUBYN CURTISS asked for more information regarding involuntary testing. **Attorney General McGrath** explained if there was probable cause to believe a particular person committed a crime and it is believed their evidence is involved in the case, a prosecutor may obtain a search warrant for a blood or urine sample to be taken.

SEN. MIKE WHEAT believed the language in the bill would allow the court discretion to decide whether or not to go forward with the petition. He maintained the court should be required to file findings of fact and conclusions of law as to why the petition was being denied. **Attorney General McGrath** claimed this was covered in Section 1(5). Subsection (4) states the court may order a hearing because most cases will be resolved short of a hearing. Subsection (5) states if the criteria is reached, the judge shall grant the petition. He added a comment in regard to the judge involved. He believed it was critical to have the trial judge, if still available, hear the case. Many of these cases involve trials that have lasted for three to four weeks. For the purpose of judicial economy, it is important to have the same judge hear the petitions for post-conviction relief. A judge must grant the petition, if the criteria is met. No one wants to convict an innocent person. If the judge does not follow the law, the appeal process is always available.

CHAIRMAN GRIMES raised a concern that the list of items under (5) was qualified by one item which is purpose of delay. **Attorney General McGrath** had a concern about the qualifier. Either the criteria was met or it was not. He believed the language addressed death penalty cases wherein prisoners filed continuous petitions for post-conviction relief. Currently the prisoners on death row are not making a claim of innocence.

SEN. WHEAT noted a prisoner who had pled guilty would need to state that he was innocent to obtain DNA testing. He questioned whether the court would need to have a separate hearing on the issue to determine if his guilty plea was given knowingly, with the consent of counsel, etc. **Attorney General McGrath** maintained that was a possibility. The House Judiciary Committee discussions involved individuals who entered into nolo contendere pleas, which are guilty pleas where the individual does not admit they actually committed the crime. Those individuals would not be included under the present bill. There was a concern in regard to a confession which may have been coerced.

Closing by Sponsor:

REP. JENT maintained no one wanted to see an innocent person in prison. DNA technology has provided the means to assure that in a few select cases, this will not happen.

HEARING ON SB 281

Sponsor: **SEN. ED BUTCHER, SD 47, WINIFRED**

Proponents: **John Foster, Property Owner**
Jim Kembel, Montana Association of Registered Land
Surveyors

Opponents: **None**

Opening Statement by Sponsor:

SEN. ED BUTCHER, SD 47, WINIFRED, introduced SB 281. He remarked the bill expands and strengthens the criminal mischief sections of the code. It addresses intentional removal of survey monuments. This could involve vandalism or the case of disgruntled adjacent landowners. Several individuals have tried to have this issue prosecuted, but the county attorneys believed the statute was not clear in this regard. A criminal action needs to be treated as such. The aggrieved party should not need to go through the incredible expense of civil actions. This bill would strengthen the criminal mischief laws to provide for a felony. When a survey monument has been removed, the land must

be surveyed again. This could cost thousands of dollars. Delays on projects become very expensive. Several amendments will be forthcoming. One amendment is to make certain surveyors, who are performing duties, indemnified from the statute. The other amendment would require the perpetrator to pay for the cost of the new survey.

Proponents' Testimony:

John Foster, Property Owner, stated when he returned from vacation a survey stake on his land was moved and his neighbor's fence was moved over. He took the issue to the county attorney but he could not find a statute which stated moving a survey stake was illegal. The county attorney advised him this situation could be prosecuted under the criminal mischief statute, but this would be "iffy". It will cost him \$800 to have a survey completed to replace the survey stake which was moved. He supports the amendment which holds the perpetrator responsible for this cost.

Jim Kembel, Montana Association of Registered Land Surveyors, rose in support of SB 281. He offered an amendment to insert language in Section 3(c), line 6, page 2, following "or both". The inserted language would state, "This subsection does not apply to a licensed professional surveyor retained to perform surveying work." They also support the amendment to have the perpetrator pay for the new survey.

Opponents' Testimony: None

Questions from Committee Members and Responses:

SEN. WHEAT asked **Mr. Foster** why his neighbor moved a survey stake. **Mr. Foster** explained that in order to reach his property, it was necessary to use an easement to the town of Heath and then travel a public road to his land. Traditionally, there were iron monuments. When he returned from vacation, a monument had been removed and the fence was moved over into the roadway.

{Tape: 2; Side: A}

SEN. WHEAT further questioned whether the neighbor claimed to own the property. **Mr. Foster** noted his neighbor claimed he should be able to use that part of the roadway for his pasture to graze his cattle. His neighbor's cattle graze the streets that are not used.

SEN. CROMLEY noted the bill was drafted to place the definition into the penalty section instead of the definition section. **SEN.**

BUTCHER did not object to clarifying the language. Contractors have told him this could result in a very expensive process. They wanted to make sure the enforcement mechanism was available for county attorneys to prosecute so that civil litigation was not necessary.

CHAIRMAN GRIMES questioned whether this bill would cover kids who randomly knocked over survey stakes. **SEN. BUTCHER** claimed if the act was malicious, the law should cover the situation. The fine is set at an amount not to exceed \$1,000 for each monument. The judge would use his discretion.

SEN. JERRY O'NEIL remarked the title stated, "An act increasing the fine for damaging, destroying, removing, or moving survey monuments without consent . . ." He questioned who would provide the consent. **SEN. BUTCHER** explained the person paying for the survey would be the one giving the consent.

CHAIRMAN GRIMES maintained that the bill may have unintended circumstances for neighbors in subdivisions where the survey stakes are not clearly identified. **SEN. BUTCHER** noted if there was contention between landowners in a subdivision, the matter would need to be settled in court. The intent of the bill is to provide a provision in statute so that a dispute can move into the proper court and the matter can be resolved legally.

Closing by Sponsor:

SEN. BUTCHER closed on SB 281.

HEARING ON SB 285

Sponsor: **SEN. MIKE WHEAT, SD 14, BOZEMAN**

Proponents: **Gordon Morris, Montana Association of Counties (MACO),
Al Smith, Montana Trial Lawyers Association**

Opponents: **John Alke, Montana Defense Trial Lawyers
Aidan Myhre, Montana Chamber of Commerce**

Opening Statement by Sponsor:

SEN. MIKE WHEAT, SD 14, BOZEMAN, introduced SB 285. He explained punitive damages are awarded only in egregious cases where actual fraud or actual malice has been proven by clear and convincing evidence. Punitive damages are a civil award in the nature of a criminal penalty. They are awarded to send a message to the defendant in the case stating they were involved in bad conduct.

The award goes to the plaintiff. The fair thing to do is to split the punitive damages, after costs, between the plaintiff and the state. The state would funnel these damages into the Crime Victims Compensation Act. This act is set up for victims of criminal conduct. He provided two handouts, **EXHIBIT(jus24a01)** and **EXHIBIT(jus24a02)**. The handouts involve the cases in Montana courts since 1990 where punitive damages have been awarded. The first handout is arranged chronologically and shows the amount of compensatory damages awarded, punitive damages awarded, and changes in punitive damages. The second handout sets out punitive damages by the type of case involved. Between 1990 and 2000, the total amount of punitive damages awarded was \$36,937,825. This amount is subject to changes on appeal. This amount could not be relied upon to calculate the amount to be funneled into the Crime Victims Program. The fiscal note states, "SB 285 would likely generate revenue that would be deposited in the general fund for use in the Crime Victims Program . . . The Department has no way to estimate the dollar amount of punitive damages awarded by juries in Montana."

Proponents' Testimony:

Gordon Morris, Montana Association of Counties (MACO), rose in support of SB 285. He noted a resolution which was adopted in 1988, and subsequently reaffirmed in 1989, 1990, 1993. The resolution involves liability and punitive damages. It states, "Now therefore be it resolved that the Montana Association of Counties endorses necessary legislation to make the award of punitive damages to the state of Montana rather than to the injured party. The sole use of the revenue for punitive damage awards would be for the redistribution and operational costs of the district court having original jurisdiction." The fiscal note on legislation introduced in 1988 stated it was impossible to estimate the amount of revenue involved. In regard to SB 285, there is no nexus between the Crime Victims Compensation Program and the plaintiff in a civil trial seeking compensatory and punitive damages. It would be appropriate to use the funds involved to fund the district court. The bill does not have an effective date. He suggested a July 1, 2003, effective date be placed in the bill to make it consistent with the state budget.

Al Smith, Montana Trial Lawyers Association, rose in support of SB 285. Punitive damages are not only for the individual plaintiff but also to provide a protection for the public. Punitive damages are brought to deter egregious behavior which includes actual malice and fraud. They are also awarded to punish the defendants involved. An example would be cases against W.R. Grace in Libby. The jury reviewed the facts and maintained the company knew for decades that the asbestos was

killing workers. The plaintiff invests a lot of money pursuing these cases. If the funds were to go to district court funding, there would be the appearance of a conflict. This is not a stable source of funding, it fluctuates from year to year. Of the \$32,000,000 in punitive damages shown on the handout, two cases amount to \$16,000,000. If punitive damages were to be used as a deterrent for egregious behavior and as a protection for the public, the plaintiff should receive some of the funds as well as the state. The Crime Victims Fund will never be fully funded. Victims will never receive what they should receive for the things they have suffered.

{Tape: 2; Side: B}

Opponents' Testimony:

John Alke, Montana Defense Trial Lawyers, commented the intent of the bill is to encourage both the frequency of an award of punitive damages as well as the size of an award of punitive damages. In a civil action before punitive damages are awarded, the jury awards actual damages. At the same time, the jury determines if there is culpability of punitive damages. If this is found to be the case, the jury then determines an award of punitive damages. The sole purpose for punitive damages is to punish the defendant. If the facts are intentionally disregarded by the defendant, malice is implied. A jury is permitted to infer malice from the conduct of the defendant. This would not always be egregious conduct. The plaintiff will argue the need to punish the defendant. The defendant will argue punitive damages are a windfall for the plaintiff, since he or she has already been fully compensated for their actual damages. This bill vests self-interest in awarding punitive damages. Jury members are taxpayers and as such will know when punitive damages are awarded, they will be the beneficiary of part of that award. The State of Georgia has a statute similar to the one proposed in this bill. In Georgia, 75 percent of the punitive damage awards goes to their general fund. A recent case included a GM truck involved in an intersection collision. The truck burst into flames and the driver was killed. The jury returned a verdict of \$4.2 million against GM for a defectively designed pickup truck. Punitive damages of \$101 million were awarded.

Aidan Myhre, Montana Chamber of Commerce, rose in opposition to SB 285. She remarked that business owners in Montana oftentimes find themselves in the position of being the defendant. Creating more confusion among jury members about trying to fund the state by using punitive damages awards, is a bad public policy decision.

Questions from Committee Members and Responses:

SEN. O'NEIL asked if the state would also be involved in post-trial negotiations in order to protect their interests in a punitive damage award. **SEN. WHEAT** did not believe this would be the case since the state is not involved in the prosecution of the case.

SEN. O'NEIL asked whether the state would pay it's portion of the cost of an appeal or would this be the plaintiff's responsibility. **SEN. WHEAT** maintained the plaintiff would defend the case on appeal.

SEN. PERRY asked whether most cases involving punitive damages would be handled by an attorney on a contingency fee basis. **SEN. WHEAT** affirmed this to be true. When he takes a case on a contingency fee basis, the costs of prosecuting the case plus the attorneys fees would be taken out of the award before it would be distributed to the plaintiff.

SEN. PERRY noted if the bill passed, there would be an increase in punitive damages awards and there would also be a corresponding increase in contingency fees. **SEN. WHEAT** did not accept the assumption that there would be an increase in punitive damage awards, if the bill passed.

SEN. PERRY further remarked that the legislature has established fines for crimes. In the awarding of punitive damages, no amounts are set in statute. **SEN. WHEAT** explained under the criminal code, fines are imposed and incarceration is the penalty for violating the criminal law. Under the civil code, there is the right to make an allegation that one is entitled to punitive damages. The plaintiff must prove by clear and convincing evidence that the defendant has engaged in actual malice or actual fraud. If the jury believes this to be the case, the jury has the right to look at the financial ability of the defendant to respond to punitive damages.

SEN. DAN MCGEE asked whether the money could go to the state's general fund rather than to the Crime Victim's Program. **SEN. WHEAT** remarked that was his initial thought but he saw an inherent conflict. Because this is in the nature of a civil penalty that is akin to a criminal fine, it could go to the Crime Victim's Program. He is not tied to that proposal.

SEN. MCGEE asked for more clarification in regard to implied malice. **SEN. WHEAT** explained that under the definition of actual malice in the code, the language states a defendant is guilty of

actual malice if he or she has knowledge of facts or intentionally disregards facts that create a high probability of injury to the plaintiff. The defendant either deliberately proceeded to act in conscious or intentional disregard and/or with indifference to the high probability of injury to the plaintiff.

SEN. MCGEE questioned whether there was a defense against the implied actual malice. **SEN. WHEAT** maintained a defense was always available. He further noted the handouts he provided involved one and a half pages of DUI cases. A drunk driver may drive in that condition knowing he or she is impaired and they may cause an accident which may seriously injure or kill someone. If they were asked if they wanted to kill someone, they would probably say that was not their intent. This is the nature of implied malice. **Mr. Alke** added that a range of conduct is involved which is determined by the facts. The jury will be able to imply the language of the statute. The jury is instructed that it can infer malice from the nature of the conduct of the defendant. He noted the case where a Clausen's Distributing driver was intoxicated and caused an accident which killed a highway patrolman. The employer was charged with the \$1 million punitive damage claim. The argument to the jury was the employer did not take sufficient action to make sure its driver was not misbehaving on the road.

SEN. O'NEIL asked when the damages would be paid to the district court. **SEN. WHEAT** remarked this would not take place until there was a final judgment. This would be after the appeal, if one was filed. There would be one bond for the total amount of the award.

{Tape: 3; Side: A}

CHAIRMAN GRIMES asked **Mr. Smith** to respond to the policy question before the Committee that the legislation would create self-interest on the part of the jury. **Mr. Smith** did not believe that would happen. He didn't think there was any correlation in the State of Georgia between the number of punitive damage cases and the passage of the law mentioned. In the case mentioned earlier, the jury awarded punitive damages because GM knew for decades that the gas tank would create an unreasonable risk. This information was concealed.

CHAIRMAN GRIMES questioned whether this would damage the defense who would often refer to this as a "windfall". **Mr. Smith** noted the defense would still be able to say this is a "windfall" to the state. They need to defend their behavior.

CHAIRMAN GRIMES raised a concern involving egregious behavior on the part of the defendant causing a loss to the family. He questioned whether it made sense to take half of the punitive award away from the family who has lost a family member. **Mr. Smith** noted that was a struggle, especially in the case of a DUI situation involving the loss of a family member. Overall, the idea still makes sense.

SEN. PERRY noted the handout involved a couple of extreme cases. On page 7, there was no compensation for economic loss found by the jury but a \$500 punitive damage award was granted. On page 4, there were compensatory damages of \$359,000 and the punitive damages were almost 20 times that amount. Any business person in the state would fear this could destroy their business. **Mr. Alke** noted the state should be reluctant to pass legislation which would raise the risk of either the frequency or the size of punitive damage awards. There is an enormous range of possible results. The larger awards for punitive damages are against the larger company. The jury is instructed on actual damages but when punitive damages are awarded this may be decided on how upset the jury is with the defendant and/or how sympathetic the jury is with the plaintiff. The public has difficulty with this aspect of the civil justice system.

Closing by Sponsor:

SEN. WHEAT remarked punitive damage awards are not a game and it does not involve a lottery system. This is a court procedure with the judge making the decision as to whether or not the issue will be presented to the jury. The jury makes their decision after hearing all the facts of the case. If a jury has not made the right decision, the judge is still the gatekeeper. In regard to the Clausen Distributing case mentioned earlier, the employer received a punitive damage award. It was a policy of the company that, while on their delivery routes, the drivers drank with the owner of the bar. The driver of the multi-ton beer delivery truck ran into the back of a highway patrolman's vehicle. The owner was contributing to the problem. In the GM case, the problem wasn't simply the design of the pickup but the information which was concealed. GM continued to allow consumers to purchase vehicles they knew were dangerous and could cause harm. This bill simply involves providing part of the punitive damage award to the state because it is the right thing to do. Whether or not the bill is passed, cases will continue to be tried in the same manner as they are today. If there are multiple defendants and one settles, the jury does not know about the settlement. It is up to the judge to take that amount off of the final award.

EXECUTIVE ACTION ON SB 283

Motion: SEN. WHEAT moved that SB 283 DO PASS.

Substitute Motion: SEN. O'NEIL made a substitute motion that SB 283 BE AMENDED.

Discussion:

SEN. O'NEIL opened on his amendment. He would strike line 23 on page 2, which would reinsert the language, "The mediator may exclude attorneys from the mediation sessions." As a mediator, he has never excluded an attorney from a mediation session. If one party had an attorney and the other party did not, he would want the power to exclude that attorney from the mediation session to provide for a balanced mediation session. Attorneys should review any agreement with their client before the client signed the agreement.

SEN. MANGAN also had a concern with the language. He noted the purpose of the mediation proceeding is to reduce the acrimony that may exist between the parties. Attorneys can cause some of the acrimony. He did not see a need for attorneys to be present at mediation sessions since attorneys are always conferring with their clients and the mediator is not allowed to give legal advice.

SEN. PERRY remarked that the clients can agree with the mediator to exclude the attorneys. If the clients chose to do so, this would be appropriate. The attorney may need to know the details of the mediation and the agreement his or her client would be signing. He did not support the amendment.

CHAIRMAN GRIMES raised a concern in that the bill may not have had the input of the mediation/counseling community.

SEN. WHEAT suggested language could be added to include the consent of the parties. This would then state "The mediator may exclude attorneys from the mediation sessions with the consent of their respective clients."

SEN. O'NEIL was concerned that one party may not be able to afford an attorney. The party represented by an attorney would not agree to excluding counsel. This would not be fair to the party not represented by counsel. It would be better to have the mediator decide whether or not the mediation would be unbalanced by excluding the attorney.

Vote: Motion carried 6-3 with CROMLEY, PERRY, and WHEAT voting no.

Motion: SEN. WHEAT moved that SB 283 DO PASS AS AMENDED.

Discussion:

SEN. WHEAT claimed the intent of the bill was to clear the conflict in regard to venue and also make it clear that attorneys may be excluded. When there is a signed agreement by the parties it can be signed by the court and the court will be able to rely on the document.

CHAIRMAN GRIMES asked Ross Cannon, Dispute Resolution Committee of the Montana State Bar, to address an issue with the possibility of this applying to parenting plans. Mr. Cannon noted the provisions of the bill applied to the commencement of the initial dissolution proceeding. The author of the bill was simply attempting to provide conformity in the law in regard to the filing of the action.

SEN. O'NEIL asked whether, under the provisions of the bill, the petitioner for a dissolution proceeding would be allowed to file in his county or the county in which the respondent resided. If the parties agreed, could this be filed in any county in Montana.

{Tape: 3; Side: B}

Mr. Cannon remarked the proper place of filing would be where the petitioner had resided for 90 days preceding commencement of the action. If the petitioner were to file the action where the respondent resided and the respondent had no objection to the venue, this would be allowed.

Substitute Motion: SEN. O'NEIL made a substitute motion that SB 283 BE AMENDED.

SEN. O'NEIL proposed an amendment stating the petition could be filed in either the county where the petitioner resided or in the county where the respondent resided. If both parties agreed, the petition could be filed in any county in Montana.

SEN. WHEAT withdrew his motion to allow time for drafting of the amendment.

EXECUTIVE ACTION ON SB 263

Motion: SEN. MCGEE moved that SB 263 DO PASS.

Substitute Motion: SEN. CROMLEY made a substitute motion that SB 263 BE AMENDED, SB026303.avl, **EXHIBIT(jus24a03)**.

Discussion:

CHAIRMAN GRIMES remarked that a purpose section was being added.

Substitute Motion: SEN. CROMLEY made a substitute motion that SB 263 BE AMENDED - instructions 1, 3, and 4 of SB026303.avl

Vote: Motion carried unanimously.

Substitute Motion: SEN. CROMLEY made a substitute motion that SB 263 BE AMENDED - instruction 2 of SB026303.avl

CHAIRMAN GRIMES explained that the amendment was offered to restrict hearsay to children who may be less inclined to use it in an erroneous fashion. If a sixteen year old was extraordinarily traumatized due to a rape and was not able to appear before a jury, hearsay should be used in that case as well. In all cases, the judge will be making the finding.

SEN. MANGAN noted the bill was very detailed in regard to what the judge needed to consider on whether or not to allow the testimony. The judge would be able to make this determination regardless of the child's age.

SEN. CROMLEY withdrew his motion.

Motion: SEN. MCGEE moved that SB 263 DO PASS AS AMENDED.

Discussion:

Amendments SB026301.avl, **EXHIBIT(jus24a04)** and SB026302.avl, **EXHIBIT(jus24a05)**, were provided to the Committee members.

Ms. Lane explained both amendments addressed on lines 4 and 5 of page 2. Amendment SB026301.avl would strike (c)(1) in its entirety. Amendment SB026302.avl would leave (c)(i) in the bill. This would read, "the child testifies or the child is unavailable as a witness . . .". Under SB026301.avl, the bill would only apply when the child is unavailable as a witness.

CHAIRMAN GRIMES added the amendments referred to Section 1 where the language stated, "Otherwise inadmissible hearsay may be admissible in evidence in a criminal proceeding, if: . . ."

SEN. WHEAT remarked that this seems to address the situation where the court has already decided not to allow hearsay evidence and the child then testifies and is not able to fully and accurately state all the facts.

Ms. Lane explained SB026301.avl was prepared due to questions about (c)(i). She did not believe there was a problem with the bill. There may be situations where a child does testify but there may be reasons why the court would allow the hearsay testimony. If the language was removed, the bill would not be able to be used in a case where the child is available. Subsection (c)(2) only addresses the situation where the child is unavailable.

CHAIRMAN GRIMES withdrew both amendments from consideration by the Committee.

Substitute Motion: **SEN. O'NEIL** made a substitute motion that **SB 263 BE AMENDED**, SB026304.avl, **EXHIBIT**(jus24a06).

SEN. O'NEIL remarked when a party is intending to offer child hearsay evidence, the notice must include the content of the statement; the approximate time, date and location of the statement; the person to whom the statement was made and the circumstances surrounding the statement. His amendment would include any videotapes and recordings of any interviews of the child in the possession or control of the party intending to offer the child hearsay testimony." The party intending to offer the child hearsay testimony would be required to produce those recordings to the defendant.

Substitute Motion: **SEN. MANGAN** made a substitute motion that **SB 263 BE AMENDED**.

SEN. MANGAN remarked this should be handled in the notice. A statement should be made that a videotape or recording was prepared. This does not involve handing over evidence, it puts the defendant on notice that there are recordings and videotapes which can be subpoenaed.

Ms. Lane explained on line 13, page 2, following the word "made" language would be inserted to state, "and whether any videotapes or recordings of any interviews of the child are in the possession or subject . . ."

Vote: Motion carried unanimously.

Motion/Vote: **SEN. MANGAN** moved that **SB 263 DO PASS AS AMENDED**. Motion carried unanimously.

ADJOURNMENT

Adjournment: 11:55 A.M.

SEN. DUANE GRIMES, Chairman

JUDY KEINTZ, Secretary

DG/JK

EXHIBIT (jus24aad)